

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONNIE J. LOVELADY

Claimant

VS.

CITY OF WICHITA

Respondent

Self-Insured

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Docket No. 213,238

ORDER

Claimant and respondent both appeal from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on February 18, 1998. The Appeals Board heard oral argument on December 11, 1998.

APPEARANCES

Claimant appeared by Robert R. Lee of Wichita, Kansas. Respondent appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties have stipulated to the admissibility of the City of Wichita Retirement Plan.

ISSUES

The ALJ awarded benefits for a permanent total disability but also found respondent was entitled under K.S.A. 1998 Supp. 44-501(h) to offset the amounts paid for a disability retirement. The offset exceeded the amount of the benefits but, the parties agreed claimant is entitled to not less than the functional impairment. Neither party challenges the permanent total disability finding but both claimant and respondent dispute the ALJ's finding of 20 percent functional impairment. Both parties also raise issues concerning the applicability and/or amount of the retirement offset.

On appeal, claimant argues that disability benefits are not subject to offset under K.S.A. 1998 Supp. 44-501(h). Claimant and respondent also both dispute the finding that claimant has a 20 percent functional impairment. Claimant contends it should be higher based on the 35 percent rating by Dr. Ernest R. Schlachter. Respondent contends that the

award should be based on functional impairment but argues that the 20 percent awarded is too high. Instead, respondent argues for the 5 percent rating given by Dr. Robert A. Rawcliffe, Jr. Respondent agrees with the ALJ that there should be an offset for the retirement disability benefits, but contends the ALJ used the wrong rate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board concludes the Award should be modified as to the disability retirement offset but should otherwise be affirmed.

The Board adopts as its own the findings and conclusions by the ALJ relating to permanent total disability and impairment of function. The Board so finds for the reasons stated by the ALJ in the Award.

But the Board also concludes the respondent is not entitled to an offset. Claimant, who at the time of his release was a 45-year-old who, because of the current injury, has been given disability benefits under the same plan addressed by the Board in Green v. City of Wichita, Docket No. 190,467 (August 1997).¹ The Board there considered whether disability benefits should be offset under the provisions of K.S.A. 44-501(h). The relevant statutory provision provides an offset for retirement benefits other than benefits attributable to contributions by the employee. As in the Green case, the benefits at issue here are referred to by the employer as disability retirement benefits. The Board held in Green that the benefits contemplated by the statute, retirement benefits, are ones payable on the basis of age and/or seniority, not disability. For that reason, the Board held, and holds again here, the benefits should not be offset.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated February 18, 1998, should be, and the same is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronnie J. Lovelady, and against the respondent, City of Wichita, for an accidental injury which occurred December 6, 1995. Claimant is entitled to 26 weeks of temporary total disability compensation at the rate of \$326 per week or \$8,476.00, followed by weekly benefits at the rate of \$326 up to the maximum benefit of \$125,000.

¹ See also Green v. City of Wichita, Docket No. 79,848 (Kan. App. 1999); petition for review filed 4/23/99.

As of May 20, 1999, there is due and owing claimant 26 weeks of temporary total disability compensation at the rate of \$326 per week or \$8,476.00, followed by 154.14 weeks of permanent total compensation at the rate of \$326 per week in the sum of \$50,249.64 for a total of \$58,725.64, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$66,274.36 is to be paid for 203.30 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director